

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

|                                 |   |                        |
|---------------------------------|---|------------------------|
| NORTHWEST ADMINISTRATORS, INC., | ) | CASE NO. C10-0194-MAT  |
|                                 | ) |                        |
| Plaintiff,                      | ) |                        |
|                                 | ) |                        |
| v.                              | ) | ORDER GRANTING         |
|                                 | ) | PLAINTIFF'S MOTION FOR |
| ACE PAVING CO., INC.,           | ) | SUMMARY JUDGMENT       |
|                                 | ) |                        |
| Defendant.                      | ) |                        |
|                                 | ) |                        |

INTRODUCTION

Plaintiff Northwest Administrators, Inc. moves the Court for summary judgment against defendant Ace Paving Co., Inc. (Dkt. 8.) This matter was brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. (ERISA), to recover remittance reports, trust fund contributions, liquidated damages, interest, attorney's fees, and courts costs from defendant based on its labor agreement with Teamsters Local 589, the Teamsters Construction Industry Welfare Trust Agreement (TCWT), and the Western Conference of Teamsters Pension Trust Agreement (WCTPT). Plaintiff is the authorized

01 administrative agent for and assignee of the TCWT and the Washington Teamsters Welfare  
02 Trust (WTWT), the latter of which became the successor trust following a merger effective  
03 January 1, 2010.

04       Following the filing of this lawsuit, defendant provided remittance reports and made all  
05 necessary payments, including liquidated damages, under the WCTPT for the time period at  
06 issue, November 2009 through January 2010. Defendant also provided remittance reports and  
07 paid contributions under the TCWT for this same time period. However, defendant failed to  
08 timely submit the TCWT contributions for the months of November and December 2009. The  
09 only remaining issue in this lawsuit is, therefore, whether defendant remains liable for  
10 liquidated damages, interest, and attorney's fees for that time period.<sup>1</sup>

11       Plaintiff seeks liquidated damages in the amount of \$1,328.60 for November 2009 and  
12 \$2,000.57 for December 2009, for a total liquidated damages award of \$3,329.17, interest in the  
13 amount of \$1.99, and attorney's fees in the amount of \$6,361.75. (*See* Dkts. 16-18.)  
14 Defendant contends the liquidated damages sought are unenforceable under Washington and  
15 federal common law as penalties and are not otherwise recoverable under ERISA. (Dkt. 12.)  
16 It seeks attorney's fees for its defense of this motion pursuant to 29 U.S.C. § 1132(g)(1).  
17 However, for the reasons described below, the Court finds plaintiff entitled to summary  
18 judgment and the liquidated damages, interest, and attorney's fees requested.

#### 19                                   BACKGROUND

20       On or around July 28, 2003, defendant and Teamsters Local 589 entered into an  
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22       <sup>1</sup> Defendant made a payment in early August 2010 covering court costs and all but a small amount of interest. (Dkt. 17, ¶ 5.)

01 agreement entitled the Heavy Construction Compliance Agreement. (Dkt. 9, Ex. B.) In so  
02 doing, defendant agreed to be bound by the June 1, 2003 through May 31, 2007 collective  
03 bargaining agreement between the Associated General Contractors of America, Inc., and  
04 several Teamsters Locals, including Local 589, and any successor collective bargaining  
05 agreements. (*Id.*) It also agreed to be bound by the TCWT. (*Id.* and Ex. A.) Defendant  
06 and Local 589 are currently parties to a collective bargaining agreement effective June 1, 2007  
07 through May 31, 2012. (*Id.*, Ex. C.) The agreement requires defendant to make contributions  
08 to the Teamsters Construction Industry Fund for all employees covered by the agreement on or  
09 before the tenth day of the month following the month in which the relevant hours were worked.  
10 (*Id.* at 13 (Section 7.2.1.))

11 Pursuant to the TCWT, a participating employer who makes delinquent contributions is  
12 required to pay liquidated damages in an amount equal to twenty percent of the delinquent  
13 contributions owed and interest on those delinquent contributions at the rate of twelve percent  
14 per annum from the date the contributions became due and payable until the contributions are  
15 paid. (*Id.*, Ex. A (Amendment to TCWT).) (*See also* Dkt. 4, ¶7 (defendant admits in its  
16 Answer “that the Trust Agreements between Defendant and the Plaintiff Trusts contain  
17 provisions providing for payment of interest and liquidated damages under certain  
18 circumstances.”)) It also requires the payment of reasonable attorney’s fees, costs, and other  
19 reasonable expenses incurred in the collection of delinquent contributions. (Dkt. 9, Ex. A.)

20 Plaintiff, as the TCWT’s authorized agent and assignee, receives monthly remittance  
21 reports from employers setting forth contributions owing for that month. (*Id.*, ¶ 20.) It did  
22 not receive any such reports from defendant for the months of November and December 2009.

(*Id.*, ¶¶ 20-22.) By letter dated January 27, 2010, counsel for plaintiff requested from defendant the monthly reports and contribution payments for the period of November 2009 and beyond. (*Id.*, Ex. D.) It thereafter, on February 1, 2010, filed the lawsuit under consideration. (Dkt. 1.) On February 10, 2010, plaintiff received the TCWT remittance reports and contributions owed from defendant for November and December 2009. (Dkt. 9, ¶ 24 and Ex. E.) Defendant did not submit associated liquidated damages. (*Id.*, ¶ 27; Dkt. 13, ¶10.)

### DISCUSSION

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. *See Celotex*, 477 U.S. at 322-23.

Genuine issues of material fact that preclude summary judgment are “disputes over facts that might affect the outcome of the suit under the governing law[.]” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding a summary judgment motion, the Court must view all facts and inferences therefrom in the light most favorable to the nonmoving party. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). “[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256 (citing Fed. R. Civ. P. 56(e)).

01 Plaintiff here seeks liquidated damages, interest, and attorney's fees based on  
 02 defendant's failure to timely submit its TCWT contributions for the months of November and  
 03 December 2009. Defendant objects to plaintiff's motion, contending the damages sought are  
 04 unenforceable and void as a penalty, and that ERISA does not mandate such damages until the  
 05 entry of a judgment.<sup>2</sup> As discussed below, both of defendant's contentions lack merit.

06 A. Law Governing Liquidated Damages

07 Defendant states that it was not provided an opportunity to negotiate any of the  
 08 provisions of the TCWT prior to entering into the agreement or provided any explanation as to  
 09 the relation of the liquidated damages provision to any actual damages suffered as the result of  
 10 unpaid contributions. (Dkt. 13, ¶¶ 6-7.) Defendant also states that the damages it has been  
 11 forced to pay over the past two years, as a result of the downturn in the economy and resulting  
 12 loss in revenues, has forced the delay in its ability to make required contributions. (*Id.*, ¶¶ 8-9.)

13 Defendant posits that the TCWT liquidated damages provision is unenforceable as a  
 14 penalty under both state and federal common law. *See, e.g., Walter Implement, Inc. v. Focht*,  
 15 107 Wn.2d 553, 558-59, 730 P.2d 1340 (1987) ("A provision in a contract which bears no  
 16 reasonable relation to actual damages will be construed as a penalty."); applying a two part test  
 17 to determine whether a liquidated damages clause may be enforced: "First, the amount fixed  
 18 must be a reasonable forecast of just compensation for the harm that is caused by the breach.  
 19 Second, the harm must be such that it is incapable or very difficult of ascertainment.") (quoting

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21 <sup>2</sup> In summarizing the "issues presented" in its brief, defendant states that there are genuine issues of  
 22 material fact regarding both the legality of the liquidated damages provision at issue in this case and the  
 availability of liquidated damages under ERISA. (Dkt. 12 at 3.) However, defendant did not  
 thereafter identify any particular factual dispute.

01 *Northwest Collectors, Inc. v. Enders*, 74 Wn.2d 585, 594, 446 P.2d 200 (1968)); *Idaho*  
02 *Plumbers & Pipefitters Health & Welfare Fund v. United Mech. Contractors, Inc.*, 875 F.2d  
03 212, 215 (9th Cir. 1989) (for a liquidated damages provision to be deemed void as a penalty  
04 under federal common law it must meet two conditions: “First, the harm caused by a breach  
05 must be very difficult or impossible to estimate. Second, the amount fixed must be a reasonable  
06 forecast of just compensation for the harm caused.”) (citations omitted). However, for the  
07 reasons asserted by plaintiff and discussed below, this argument fails.

08 ERISA obligates participating employers to make contributions to a multi-employer  
09 trust fund in accordance with the contract and trust agreement. *See* ERISA Section 515, 29  
10 U.S.C. § 1145. It provides, at § 1132(g)(2), specific remedies for delinquent contributions,  
11 including, in addition to the unpaid contributions, liquidated damages, interest, attorney’s fees,  
12 and costs. As noted, defendant is also bound by a trust agreement containing terms as to  
13 damages owed as a result of delinquent contributions. (Dkt. 9, Exs. A-C.)

14 “Section 1132(g)(2) is ‘mandatory and not discretionary.’” *Northwest Adm’rs Inc. v.*  
15 *Albertson’s, Inc.*, 104 F.3d 253, 257 (9th Cir. 1996) (quoting *Operating Eng’rs Pension Trust v.*  
16 *Beck Eng’g & Surveying, Co.*, 746 F.2d 557, 569 (9th Cir. 1984)). Entitlement to a mandatory  
17 § 1132(g)(2) award requires that: “(1) the employer must be delinquent at the time the action is  
18 filed; (2) the district court must enter a judgment against the employer; and (3) the plan must  
19 provide for such an award.” *Id.* (citing *Idaho Plumbers & Pipefitters Health & Welfare*  
20 *Fund*, 875 F.2d at 215).

21 Here, it is undisputed that defendant was delinquent in making its contributions at the  
22 time plaintiff filed this suit and that the trust agreement provides for liquidated damages,

01 interest, attorney's fees, and courts costs. Also, as discussed further below, "mandatory fees  
02 are available under § 1132(g)(2) 'notwithstanding the defendant's post-suit, pre-judgment  
03 payment of the delinquent contributions themselves.'" *Id.* at 258 (quoting *Carpenters*  
04 *Amended & Restated Health Benefit Fund v. John W. Ryan Constr. Co.*, 767 F.2d 1170, 1175  
05 (5th Cir. 1985)). Plaintiff is, accordingly, entitled to liquidated damages, interest, and  
06 attorney's fees under § 1132(g)(2).

07 Defendant's reliance on state and federal common law is unavailing. ERISA contains  
08 an expansive preemption provision. *See generally* 29 U.S.C. § 1144 (a) (ERISA "shall  
09 supersede any and all State laws insofar as they may now or hereafter relate to any employee  
10 benefit plan" covered by ERISA) and (c)(1) ("State law" includes all laws, decisions, rules,  
11 regulations, or other State action having the effect of law[.]); *Egelhoff v. Egelhoff*, 532 U.S.  
12 141, 146 (2001) (observing that ERISA's preemption provision is "clearly expansive.")  
13 (sources omitted); *General Am. Life Ins. Co. v. Castonguay*, 984 F.2d 1518, 1521 (9th Cir.  
14 1993) ("ERISA's preemption clause is one of the broadest ever enacted by Congress, and it  
15 preempts even generally applicable laws, not just laws aimed exclusively at employee benefit  
16 plans[.]") (internal citations omitted).

17 Section 1132(g)(2)(C)(ii) specifically allows for a grant of "liquidated damages  
18 provided for under the plan in an amount not in excess of 20 percent[.]" Defendant fails to  
19 support the contention that the liquidated damages provision at issue here, allowing for twenty  
20 percent of delinquent contributions owing (Dkt. 9, Ex. A), may escape preemption.

21 Indeed, plaintiff entirely ignores the issue of preemption, focusing instead on  
22 distinguishable and inapplicable state and federal common law. For instance, in the Ninth

Circuit decision relied upon by plaintiff, *Idaho Plumbers & Pipefitters Health & Welfare Fund*, 875 F.2d at 215, the Court noted that § 1132(g)(2) did not apply because there were no unpaid contributions at the time the suit in that case was filed. *See also, e.g., Board of Trustees of Local 41, Int'l Bhd. of Elec. Workers Health Fund v. Zacher*, 771 F. Supp. 1323, 1332 (W.D.N.Y. 1991) (same); *Walter Implement, Inc.*, 107 Wn.2d at 555-59 (considering contract claim under state law). The Ninth Circuit also read the legislative history to indicate that “Congress intended only to preempt laws limiting liquidated damages to an amount below the 20% level *when the terms of § 1132(g)(2) are satisfied.*” *Idaho Plumbers & Pipefitters Health & Welfare Fund*, 875 F.2d at 217 (emphasis in original). Here, as stated above and discussed further below, the terms of § 1132(g)(2) are satisfied. The state and federal common law cases relied on by defendant are, therefore, inapposite, and plaintiff is entitled to the liquidated damages, interest, and attorney’s fees sought.

B. Liquidated Damages Award Prior to Judgment

Section 1132(g)(2)(C)(ii) provides for an award of liquidated damages “in an action to recover delinquent contributions . . . in which a judgment in favor of the plan is awarded[.]” Defendant avers that this provision, therefore, allows for liquidated damages only once a judgment has been awarded. *See Idaho Plumbers & Pipefitters Health & Welfare Fund*, 875 F.2d at 215 (§ 1132 (g)(2)(C)(ii) “applies when (1) the fiduciary *obtains a judgment* in favor of the plan, (2) unpaid contributions exist at the time of suit, and (3) the plan provides for liquidated damages.”) (emphasis added). Relying on a Sixth Circuit decision supporting this reading of § 1132(g)(2), defendant maintains that, because it paid all contributions owing, plaintiff’s action – seeking liquidated damages alone – necessarily fails. *In re Michigan*



01 *Carpenters Council Health & Welfare Fund*, 933 F.2d 376, 388 (6th Cir. 1991) (concluding  
 02 that § 1132(g)(2)(A) and (B) “apply only if there were unpaid contributions on the date of the  
 03 award” because § 1132(g)(2) “provides that upon ‘a *judgment* in favor of the plan’ the court  
 04 shall award the plan ‘*the* unpaid contributions’ and ‘interest on *the* unpaid contributions.’”) (quoting § 1132(g)(2)(A) and (B)) (emphasis added by court). However, defendant fails to  
 05 support this reading of § 1132(g)(2) under Ninth Circuit law.

07 As stated above, the Ninth Circuit has held that “mandatory fees are available under §  
 08 1132(g)(2) ‘notwithstanding the defendant’s post-suit, pre-judgment payment of the delinquent  
 09 contributions themselves.’” *Northwest Adm’rs Inc.*, 104 F.3d at 258 (quoting *Carpenters*  
 10 *Amended & Restated Health Benefit Fund*, 767 F.2d at 1175). In so doing, the Ninth Circuit  
 11 rejected the contention that an employer was not obligated to pay liquidated damages and  
 12 attorney’s fees on contributions voluntarily paid prior to the entry of a judgment. *Id.*

13 It appears that, excluding the Sixth Circuit, every Court of Appeals to consider the issue  
 14 concurs with the Ninth Circuit. See *UAW Local 259 Soc. Sec. Dep’t v. Metro Auto Ctr.*, 501  
 15 F.3d 283, 288-89 (3d Cir. 2007) (§ 1132(g)(2) remedies apply to all contributions unpaid at the  
 16 time a suit is filed, even if the debts are partially satisfied before judgment); *Operating Eng’rs*  
 17 *Local 139 Health Benefit Fund v. Gustafson Constr. Corp.*, 258 F.3d 645, 654 (7th Cir. 2001)  
 18 (“The interest and liquidated-damages provisions of ERISA apply . . . only to contributions that  
 19 are unpaid at the date of suit (not the date of judgment, as argued by the defendant.”); *Iron*  
 20 *Workers Dist. Council v. Hudson Steel Fabricators & Erectors, Inc.*, 68 F.3d 1502, 1507 (2d  
 21 Cir. 1995) (“[T]he provisions of § 1132(g)(2)(B) and (C) make reference to unpaid  
 22 contributions not to establish a limit on qualifying judgments, but rather because the amount of

01 an award of interest or liquidated damages should logically be predicated upon the amount of  
02 the unpaid contributions originally at issue, whether or not outstanding at the time of judgment,  
03 since that amount correctly measures the damage caused by the delinquency.”) *See also*  
04 *Carpenters & Joiners Welfare Fund v. Gittleman Corp.*, 857 F.2d 476, 478 (8th Cir. 1988)  
05 (agreeing that “unpaid contributions” accounted for in § 1132(g)(2) means “contributions  
06 unpaid at the time suit was filed[.]”)

07       These decisions reflect the intention that an employer not “escape its statutory liability  
08 for interest, liquidated damages or double interest, attorney fees, and costs simply by paying the  
09 delinquent contributions before entry of judgment in a § 1132(g)(2) action brought to recover  
10 delinquent contributions.” *Iron Workers Dist. Council*, 68 F.3d at 1506. As stated by one  
11 court: “Permitting delinquent employers to avoid paying § 1132 penalties after suit is filed . . .  
12 would largely thwart the purpose of § 1132(g)(2) to provide plan fiduciaries with an effective  
13 weapon against delinquent employers. It would also anomalously cause only employers with  
14 legitimate legal arguments (. . . awaiting final judgment) to pay ancillary relief.” *Id.* at 1508  
15 (internal citations omitted). *Accord UAW Local 259 Soc. Sec. Dep’t*, 501 F.3d at 289 (“The  
16 payment of interest compensates plans for one kind of cost[] incurred in connection with  
17 delinquencies, that is, the loss of interest. The purpose of the provision would be defeated if  
18 we allowed employers to avoid paying interest simply by satisfying their debt moments before  
19 the court issues judgment.”) (quotation marks and quoted sources omitted).

20       Defendant unsuccessfully distinguishes the applicable, binding case law. It notes that  
21 *Northwest Adm’rs*, unlike this case, involved the entry of a judgment for unpaid contributions.  
22 *See* 104 F.3d at 258 (noting judgment entered in the amount of \$60,037.60, including

01 \$42,821.62 in delinquent contributions). However, it remains that the Ninth Circuit in that  
 02 case awarded liquidated damages and attorney's fees associated with both contributions that  
 03 remained deficient *and* those paid prior to the entry of judgment. *Id.* at 257-58. The Court  
 04 also explicitly rejected the contention that the mandatory fees provided for in § 1132(g)(2) may  
 05 not be awarded in the absence of a judgment. *Id.* at 258 (“fees may be awarded even though  
 06 there is no judgment on the merits or when the dispute has become moot because relief is  
 07 otherwise obtained.”) (quoting *Lads Trucking Co. v. Board of Trustees of W. Conference of*  
 08 *Teamsters Pension Trust Fund*, 777 F.2d 1371, 1375 (9th Cir. 1985)).

09 At least one district court within the Ninth Circuit has applied the ruling in *Northwest*  
 10 *Adm'rs* to a case, like this one, in which unpaid contributions were voluntarily paid in full prior  
 11 to the entry of judgment. *Trustees of the Constr. Indus. v. B Witt Concrete Cutting, Inc.*, 685 F.  
 12 Supp. 2d 1158, 1163 (D. Nev. 2010) (finding an award of damages pursuant to § 1132(g)(2)  
 13 mandatory even where delinquent contributions were paid prior to judgment; stating that the  
 14 Ninth Circuit has “squarely rejected” the interpretation of the Sixth Circuit on this issue) (citing  
 15 *Northwest Adm'rs*, 104 F.3d at 258, and *In re Michigan Carpenters Council Health & Welfare*  
 16 *Fund*, 933 F.2d at 388).<sup>3</sup> See also *Fanning v. Langenfelder Marine, Inc.*, No. 07-2182 (PLF),  
 17 2010 U.S. Dist. LEXIS 29827 at \*4-6 (D. D.C. Mar. 29, 2010) (finding employer who paid all  
 18 delinquent contributions after suit filed liable for twenty percent of the amount due pursuant to  
 19 § 1132(g)(2)). As with cases involving partial payments of delinquent contributions, the

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21 3 Plaintiff provides several unpublished district court decisions from the Ninth Circuit recognizing that  
 22 liquidated damages may be awarded even where unpaid contributions are tendered prior to the entry of  
 judgment. (Dkt. 16, Exs. A-C.) However, those cases also involved other outstanding unpaid  
 contributions. (*See id.*)

01 conclusion that liquidated damages may be collected following the full payment of delinquent  
02 contributions supports the underlying purpose of § 1132(g)(2) and avoids the possibility that an  
03 employer may evade its obligations under this provision simply by paying delinquent  
04 contributions at some point prior to the entry of a judgment. Defendant's contention that §  
05 1132(g)(2) is inapplicable because it paid all outstanding delinquent contributions prior to the  
06 entry of a judgment, therefore, fails.

07 CONCLUSION

08 In sum, the Court finds no issues of fact regarding either the enforceability of the  
09 collective bargaining and trust agreements at issue in this case or plaintiff's entitlement to the  
10 total amount of liquidated damages, interest, and attorneys' fees sought. Accordingly,  
11 plaintiff's motion for summary judgment is hereby GRANTED and plaintiff awarded  
12 liquidated damages in the amount of \$3,329.17, interest in the amount of \$1.99, and attorney's  
13 fees in the amount of \$6,361.75.

14 DATED this 7th day of September, 2010.

15 /s/ Mary Alice Theiler  
16 MARY ALICE THEILER  
17 United States Magistrate Judge  
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